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IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND Petitioner v. JOSEPH TILLMAN, et al., Respondents and Cross-Petitioners	CASE NO. 65,736

RESPONDENT TILLMAN'S BRIEF ON THE MERITS RESPONDING TO THE FUND'S BRIEF

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CITATIONS OF AUTHORITY

QUESTION PRESENTED

THE FOURTH DISTRICT CORRECTLY HELD THAT §95.11(4)(b) F.S. DOES NOT BAR PLAINTIFF'S ACTION AGAINST THE FUND

SUMMARY OF ARGUMENT

The two year statute of limitations provided by Section 95.11(4)(b) F.S. does not govern the Fund's joinder in an action against one of its member health care providers. MERCY HOSPITAL, INC., v. MENENDEZ, 371 So.2d 1077 (Fla. 3rd D.C.A. 1979) was wrong in its conclusions, and therefore, the decisions of the other District Courts that have followed MENENDEZ are likewise wrong. The Fourth District's decision to the contrary in this case should be adopted.

ARGUMENT

The issue presented is whether a statute of limitations defense is available to the Fund in an action timely filed against the health care provider, where the Fund has been joined after the two-year statute of limitations governing the action against the health care provider has run. A number of cases have been previously certified to this Court on this same issue: TADDIKEN v. FLORIDA PATIENT'S COMPENSATION FUND, 149 So.2d 956 (Fla. 3d D.C.A. 1984) and LUGO v. FLORIDA PATIENT'S COMPENSATION FUND, 452, So.2d 633 (Fla. 3d D.C.A. 1984). Those cases are presently pending before this Court. Plaintiff adopts and incorporates by reference the arguments made and briefs filed by the Plaintiffs in those cases.

As demonstrated by the cases listed at pages 1-2 of the Fund's brief, except for the Fourth District, the District Courts have ruled in favor of the Fund on this issue. The Fourth District rejected those decisions, and agreed with the plaintiff's position below that the two-year statute of limitations provided by §95.11(4)(b) does not govern the Fund's joinder in an action against one of its member health care providers.

A cursory reading of the decisions which have accepted the Fund's position will reveal that each of them is bottomed squarely upon the Third District's decision in MERCY HOSPITAL, INC., v. MENENDEZ, 371 So.2d 1077 (Fla. 3rd D.C.A. 1979), cert. denied, 383 So.2d 1198, (Fla. 1980). In that case, while answering an altogether different question, the Third District opined that judgments against the Fund's member health care

providers must be limited to $100,000 and that the Fund's obligation is not like that of an insurance company to its member health care providers, but is a direct obligation to the patient. Because both of these conclusions are directly contradicted by the express language of §768,54, Fla. Stat. (1981), MENENDEZ is simply wrong -- and the Fourth District said precisely that in FLORIDA MEDICAL CENTER, INC., v. VON STETINA, 436 So.2d 1022 (Fla. 4th D.C.A. 1983).

The other District Courts have blindly followed MENENDEZ to date, and in doing so have overlooked the following: First, only the health care provider commits a tort when he commits medical malpractice, not the Fund. When that malpractice is discovered, it is eminently logical that the Statute of limitations should begin to run on the claim against the known tortfeasor. At that point, however, the typical medical malpractice victim will be completely ignorant concerning the existence of the Fund as a potential defendant, because he has had no dealings with the Fund. Only the health care provider has had any dealings with the Fund, and only the health care provider will know of the existence of this additional potential defendant.

Moreover, at that point, the Fund has done absolutely nothing wrong to the Plaintiff, and has no obligation whatsoever to the plaintiff until the health care provider is ultimately found liable. In our judgment, however logical it may be to start the statute of limitations running on a claim against a known tortfeasor, it is illogical (and unfair) in the extreme to

start the statute of limitations running on a claim against someone who has committed no tort, whose existence is unknown to the plaintiff, whose only relationship is with the tortfeasor, and who has no obligation to the plaintiff until the tortfeasor is found liable.[1] The courts of this state long ago recognized the absurdity of such a conclusion where insurance companies are concerned, and the same reasons which compelled a conclusion in those cases that the statute of limitations does not begin to run until the insured has been found liable apply equally to the Fund and its member health care providers. (See e.g. CLEMONS v. FLAGLER HOSPITAL, INC., 385 So.2d 1135 (Fla. 5th D.C.A. 1980).

1/Only one Court has troubled itself to respond to this type of argument. In TADDIKEN V. FLORIDA PATIENT'S COMPENSATION FUND, supra, the Third District responded to a similar argument with the observation that the Fund's records are open to the public for inspection. We think that observation is purely a makeweight, since we know of no law in the context of statutes of limitation which requires a tort plaintiff to search the public records for the existence of unknown potential defendants. Moreover, there is no provision in §768.54 providing for written inquiry concerning the membership status of a particular health car provider. All that the statute says is that the books and records of the Fund shall be open for reasonable inspection to the general public. Section 768.54(3)(3)2. In our judgment, it is altogether unreasonable to require a medical malpractice victim to travel to Tallahassee to inspect the records of the Fund in order to protect himself against the possibility that the statute of limitations may be running against an unknown potential defendant.

More importantly, the availablilty of the Fund's records addresses only the problem of knowledge (or more accurately, the means of knowledge); it does not address the problematical fact that there is no relationship between the plaintiff and the Fund, and that the Fund owes no obligation to the plaintiff until its member health care provider has been found liable. All things considered, the Third District's makeweight is slim reason indeed for the sacrifice of substantive rights effected by the type of ruling in issue here.

The Fund is clearly no different than an insurance company, and the courts which have held otherwise have simply invented a set of new clothes for the emperor. The Fourth District blew the whistle on that illusion in VON STETINA when it described the Fund as "a trust fund in the nature of liability insurance", and when it held that "the purpose of [§768.54] was not to limit the amount of the judgment against the health care provider but rather to prescribe the manner of collection of the judgment". 436 So.2d at 1025, 1028. Given the reality of the Fund's status as a statutorily-created insurance company, the law governing insurance companies clearly should apply to the problem at hand.

The District Courts which have been deceived by the emperor's new clothes have also overlooked the tremendous practical problems which their holdings have caused. In order to comply with their illogical holdings (and to avoid an expensive trip to Tallahassee during the Fund's working hours), it has become both necessary and customary for medical malpractice plaintiffs to name the Fund as a defendant in every initial complaint directed to a health care provider. If the defendant health care provider is a member of the Fund, no harm is caused.[2] But if the defendant-health care provider is not a member of the Fund, the Fund has been unnecessarily joined and has been required to spend unnecessary monies to enter an appearance and defend (which only aggravates the so-called

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2/ Curiously, however, the Fund then customarily takes the inconsistent position that it is like an insurance company, and succeeds in preventing its mention at trial under Rule 1.450(3) Fla. R. Civ. P.

"medical malpractice insurance crisis"). What customarily follows is an affidavit to the effect that the health care provider is not a member of the Fund, accompanied by a motion for summary judgment and a motion for attorney's fees under §57.105 Fla. Stat. (the "frivolous claim" attorney's fee statute). Typically, because both motions are indefensible, both motions are granted -- and the plaintiff has been penalized economically for merely protecting against the unknown.[3] Very little of this makes any sense; none of it is necessary; and all of it can be alleviated simply by treating the Fund for what it is -- a "trust fund in the nature of liability insurance."

Finally, and perhaps most importantly, once is it understood that §768.54 does not limit the amount of the judgment which can be entered against the health care provider (as this Court squarely held in VON STETINA), it is the health care provider, not the plaintiff, who is left holding the bag by rulings like the one entered below. If the Fund is allowed out of the lawsuit judgment for the full amount will be entered against St. Mary's, St. Mary's has lost benefit of the coverage which they paid for from the Fund -- not for anything which they did, but simply

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3/ If the attorney's fees awarded are less than the cost of a trip to Tallahassee, the plaintiff has at least been spared some of the economic penalty which the Third District imposed upon him in TADDIKEN as the price of knowledge of the unknown.

because the plaintiff did not join the fund in the action before he discovered its existence as an additional defendant through discovery taken.[4]

With all due respect to the other District Courts, St. Mary's insurance coverage should not depend upon whether the plaintiff discovered the existence of the Fund as an additional defendant and joined it before the statute of limitations ran on the claim against it; it should depend on the contract between St. Mary's and the Fund.[5] The perfectly absurd loss of St. Mary's insurance coverage in this case should be rectified by following VON STETINA and TILLMAN, which we respectfully urge the Court to do.

4/ Although it would seem that St. Mary's should have an action on its contract for indemnification against the Fund in this hypothetical circumstance, such an action seems doubtful in the other Districts -- in view of MENENDEZ' insupportable conclusion that the Fund's obligations are owed to the plaintiff, rather than the health care provider with which it has contracted to provide in the language of §768.54, "coverage".

5/ If the other Districts are correct notwithstanding VON STETINA, then a really vindictive medical malpractice victim can simply void his adversary's coverage by never naming the Fund as a defendant. It is a certainty that none of these other District courts have recognized that potential problem in deciding the issue presented here. In reality, it should be St. Mary's who is complaining most vociferously here, since it has the most to lose by the trial court's ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: RICHARD B. COLLINS, P. O. Drawer 5286, Tallahassee, FL 32314; ROBERT M. KLEIN, One Biscayne Tower, Suite 2400, Miami, FL 33131; L. MARTIN FLANAGAN, P. O. Drawer E, WPB, FL 33402; DAVID CROW, Suite 500-Barristers Bldg., 1615 Forum Place, WPB, FL 33401; FRED HAZOURI, P. O. Box 3466, WPB, FL 33402; and to MICHAEL DAVIS, Post Office Box 2966, WPB, FL 33402, this 17th day of MAY, 1985.

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